

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

Direct Access to the
INTELSAT System)

) IB Docket No. 98-192
) File No. 60-SAT-ISP-97
)

COMMENTS OF LORAL SPACE & COMMUNICATIONS LTD.

Loral Space & Communications Ltd. ("Loral") hereby submits its comments in the above-referenced proceeding.¹ Loral supports the Commission's proposals to permit direct access to the INTELSAT system in the U.S. Both the Communications Satellite Act of 1962 and the Communications Act of 1934, as amended, give the FCC the authority to permit U.S. carriers and users the option of obtaining Level 3 (contractual) direct access to INTELSAT. Direct access will provide significant public benefits and is therefore in the public interest.

I. Direct Access To INTELSAT Is Lawful

The Commission has concluded, correctly, that it has the authority to permit other U.S. carriers and users to obtain Level 3 direct access to INTELSAT and that such access is consistent with the Satellite Act, the Communications Act and the Fifth Amendment.² Although the Satellite Act created Comsat to undertake an exclusive role as the U.S. participant in INTELSAT, that statutory exclusivity is limited to investment in and governance of the INTELSAT system, and

¹ In re Direct Access to the INTELSAT System, IB Docket No. 98-192, File No. 60-SAT-ISP-97 (rel. Oct. 28, 1998) ("NPRM"). See also Order, DA 98-2371 (rel. Nov. 23, 1998) (extending the pleading cycle deadlines).

² NPRM at ¶ 19.

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does not encompass access to INTELSAT space segment.³ Authorizing Level 3 direct access would not be inconsistent with Comsat's statutory role as it would still be the only U.S. representative on the INTELSAT Board of Governors and at the Meetings of Signatories of INTELSAT and the only U.S. investor in INTELSAT. The Satellite Act confers broad authority on the Commission to ensure "that any economies made possible by a communications satellite system are appropriately reflected in rates for public communications services."⁴ That grant, together with the Commission's responsibility to regulate Comsat's rates,⁵ support the Commission's conclusion that it has authority to implement direct access.

The Commission also correctly concluded that permitting Level 3 access to INTELSAT would not violate the Fifth Amendment since Comsat has no contractual property right to be the exclusive marketer of INTELSAT capacity in the U.S.⁶ Since Comsat does not possess a vested property right with respect to its access to INTELSAT space segment, mandatory direct access would not result in a taking of property in violation of the Fifth Amendment. However, even if Comsat had a vested property right, direct access to INTELSAT (1) would not result in a physical occupation of Comsat's property because Level 3 access is contractual in nature and permits "use" but not a permanent occupation; (2) would serve an important government objective: promoting competition; and (3) Comsat will continue to have an opportunity to earn a fair return on its investment in INTELSAT.

³ Id. at ¶ 17.

⁴ 47 U.S.C. § 721(c)(5).

⁵ Id.

⁶ NPRM at ¶ 32, 35.

II. Direct Access To INTELSAT Is In The Public Interest

The record before the Commission in 1998 is very different than the record the Commission considered in the 1984 Direct Access proceeding.⁷ In the 1984 Direct Access proceeding, the Commission considered only Level 4-type direct access to INTELSAT.⁸ Here, the Commission proposes to allow only Level 3 access for which INTELSAT has recently developed special procedures.⁹ In the 1984 Direct Access proceeding, the Commission determined that no significant cost savings would result from direct access and that the public interest would not be served by its implementation. The record in the 1998 Comsat Non-Dominant proceeding¹⁰ however, shows that since 1984, the international market has experienced entry by a variety of new carriers and unprecedented growth. Separate systems have been authorized and satellite regulations have been streamlined. A variety of new services, including low earth orbit offerings have been introduced. Finally, Comsat has been reclassified as a non-dominant carrier for many of its services.¹¹

⁷ Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, Report and Order, 97 FCC Rcd. 296 (1984) ("1984 Direct Access Order"); *aff'd sub nom. Western Union International, Inc. v. FCC*, 814 F.2d 1280 (D.C. Cir. 1986).

⁸ Direct Access Order at 300. The Commission considered two direct access alternatives: a "capital lease" and an indefeasible right of use (IRU). Level 3 access was not available at this time.

⁹ NPRM at ¶ 8.

¹⁰ Comsat Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 14083 (1998) ("Comsat Non-Dominant Order").

¹¹ See Id.

Lack of direct access in the U.S. distorts the satellite services market in a way that is contrary to the public interest because it inhibits competition. Direct access to INTELSAT will eliminate an artificial market division which has diminished competition in the provision of worldwide satellite-based communications services. As noted by the Commission, if Level 3 direct access were permissible, Comsat "would no longer be the sole provider of switched voice, private line and occasional-use video service" in various currently non-competitive markets or be the sole provider of INTELSAT capacity serving these markets.¹² Direct access, therefore, would reduce Comsat's exclusive control over INTELSAT capacity in such markets and give U.S. carriers and users a choice in satellite suppliers. As the Commission has already found, increasing the number of suppliers to each market will increase competition.¹³ Direct access would also subject Comsat to competition across all service categories. This will eliminate the risk of cross-subsidization. It should also eliminate double marginalization¹⁴ and create incentives to further reduce costs and rates. Comsat will be compelled to develop new and innovative services in response to competitive market conditions.

If direct access is implemented, INTELSAT services themselves will become available on a competitive basis in the U.S. satellite market. Thus, satellite capacity will become available on certain routes which are currently noncompetitive and which are accessible only through Comsat. Carriers and end-users will be able to take advantage of these cost reductions and new service opportunities which should result in an increase in satellite service output.

¹² Id. at ¶ 155.

¹³ Id.

¹⁴ Double marginalization occurs when INTELSAT's marginal costs, as well as Comsat's marginal costs, are included in rates charged to end-users.

INTELSAT and its ultimate customers (both carriers and end-users) have recognized that direct access to the INTELSAT system will result in widespread public benefits including:

- reduction of rates for international and domestic satellite services through the avoidance of multiple markups;
- new and more flexible services (including virtually any combination of bandwidth, earth station capabilities, service duration and performance options), and
- improved efficiency and customer responsiveness and control over service offerings from their initiation through implementation of service.¹⁵

For most companies (satellite operators, telecommunications carriers and end users), the most significant result of direct access will be the avoidance of mark-up costs Comsat charges to third parties. A comparison of 1997 Comsat and INTELSAT rates (attached as Appendix B to the NPRM) indicates that in many cases, Comsat rates are significantly higher than INTELSAT rates for the same services. In the Comsat Non-Dominant proceeding, the Satellite Users Coalition submitted a detailed study to support its argument that there would be substantial cost savings from direct access.¹⁶ The Coalition asserts that some of Comsat's rates are 250% higher than the INTELSAT Utilization Charge (IUC).¹⁷ The Coalition states that direct access would

¹⁵ NPRM at ¶ 44 (*citing* "Accessing INTELSAT. . . Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872 at 135-141.) See also Satellite Users' Coalition "The Legal Authority of the Federal Communications Commission to Authorize Direct Access to the INTELSAT System" at 3-4 (filed March 6, 1998) ("Coalition Legal Analysis").

¹⁶ NPRM at ¶ 11. See The Satellite Users' Coalition "Analysis of Privatization of Intergovernmental Satellite Organizations Proposed in H.R. 1872 and S.1382" (filed March 16, 1998) ("Coalition Privatization Analysis").

¹⁷ Coalition Privatization Analysis at 24. The Coalition asserts that this is the case "even though Comsat itself was providing no facilities to its customer." Id. at 17, 24. The IUC is the rate Signatories pay INTELSAT for use of its space segment.

reduce Comsat's average margin from 68% to 35% and it estimates that over a 10-year period, total U.S. consumer benefits could exceed \$1 billion by linking directly to INTELSAT.¹⁸

Various satellite users such as NBC, ABC, CBS and Turner Broadcasting have also contended that direct access by carriers and end users could reduce end user rates and provide a competitive check on Comsat.¹⁹ Satellite operators agree that direct access to INTELSAT will reduce the substantial mark-ups currently paid by Comsat's customers as well as enhance competition in the international satellite services marketplace.²⁰

With direct access, Loral's subsidiary, Loral Orion, Inc. ("Loral Orion")²¹ would avoid Comsat's mark-ups of between 9% and 15% on U.S. half circuits for INTELSAT services. Avoiding such mark-ups would make Loral Orion more competitive and allow it to pass along savings to consumers. Furthermore, direct access would negate the advantages that companies such as Teleglobe have over U.S. operators like Loral Orion. Currently, Teleglobe, the Canadian INTELSAT Signatory, has an unfair competitive advantage over Loral Orion because it can purchase INTELSAT capacity directly from INTELSAT in Canada and then deliver traffic to the U.S. on its own fiber. If the U.S. adopted direct access, Teleglobe's competitive edge, which arises from the fact that it can buy INTELSAT services directly and Loral Orion cannot, would be

¹⁸ Id. at 24, 25.

¹⁹ NPRM at ¶ 11 (*citing* Partial Opposition of ABC, Inc., CBS, Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. at 23, filed in the Comsat Non-Dominant proceeding, filed June 16, 1997).

²⁰ See, e.g., Comments of GE American Communications, Inc. at 4 (filed in the Lockheed Martin/Comsat proceeding, File Nos. SES-T/C-19981016-01388(2), ITC-T/C-19981016-00715, SAT-ISP-19981016-00071, Nov. 23, 1998 ("Lockheed Martin/Comsat proceeding")).

²¹ Loral Orion operates an international satellite communications system, delivering multimedia applications through customized private communications networks as well as transmission capacity and video distribution services worldwide.

negated. Matching the use of direct access in the U.S. with similar access abroad would place Loral Orion and other U.S. operators on an equal footing with INTELSAT Signatories in pricing INTELSAT links. The result would be lower prices and more competition.

Loral Orion has been able to expand the number of countries to which it offers service because direct access in those countries made it economical to initiate service there. In Germany and the United Kingdom, for example, the advent of direct access reduced rates for INTELSAT space segment by 25% or more.

A number of the most progressive telecommunications authorities have recognized the public interest benefits of direct access.²² In 1994, the Council of the European Union ("EU") recognized that a basic goal of EU telecommunications policy was nondiscriminatory access to space segment capacity, including space segment provided by intergovernmental organizations such as INTELSAT (Council Resolution of December 22, 1994). Subsequently, ten members of the Union (Austria, Denmark, France, Germany, Ireland, Netherlands, Portugal, Spain, Sweden and the United Kingdom) authorized Level 3 or Level 4 access. Australia, Brazil and Japan have also authorized Level 3 direct access and Industry Canada has reached an agreement with Teleglobe Canada to provide non-Signatories with the opportunity to access INTELSAT on the same basis as if they enjoyed Signatory status. Comsat would have the Commission believe that the U.S. marketplace is a special case where the public interest benefits which have led other progressive administrations to adopt direct access do not obtain.

²² To date, 93 countries permit either Level 3 or Level 4 direct access to INTELSAT. Seventy-six countries permit Level 3 direct access. NPRM at ¶¶ 10, 44. In the case of Level 3 access, customers have no investment obligations or rights to participate in the operation of the INTELSAT system and the INTELSAT Signatory in that country will earn a return on its investment for space segment used by Level 3 customers (up to 21%). Id. at ¶ 9.

III. A Fresh Look Policy Must Be Adopted to Implement Direct Access

In granting direct access, the Commission should also permit Comsat customers an opportunity to reevaluate their Comsat contracts, to renegotiate contract terms or choose another provider without the imposition of a penalty. The "fresh look" policy permits renegotiation of existing contracts in order to take advantage of new competitive opportunities made possible by market forces and changes in Commission regulations.²³ The Commission has applied this policy where, as in the case of direct access, a monopoly market is first opened to competition or where pre-existing contracts would prevent customers from obtaining the benefits of changed regulatory circumstances.²⁴

For example, in the context of deregulating AT&T's monopoly inbound 800 services business, the Commission permitted AT&T customers to terminate their contracts within 90 days of the time 800 numbers became portable, without the imposition of any termination liabilities.²⁵ Again, in the *1994 Expanded Interconnection Order*, the Commission gave local exchange carrier customers an opportunity to take advantage of the new competitive opportunities made possible by expanded interconnection.²⁶ The Commission implemented "fresh look" and limited the charges that LECs could impose on customers who wanted to terminate long-term special access

²³ See In re Expanded Interconnection with Local Telephone Company Facilities, Second Memorandum Opinion and Order, 8 FCC Rcd. 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Companies, et. al. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *on remand In re Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order*, 9 FCC Rcd. 5154, 5208 (1994) ("1994 Expanded Interconnection Order").

²⁴ See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd. 2677 (1992) ("800 Number Portability Order").

²⁵ 800 Number Portability Order at 2678.

²⁶ Expanded Interconnection Order at 5208.

agreements. The Commission determined that "in the absence of fresh look, implementation of expanded interconnection would lead to only limited special access because of the effects of long-term contracts" and that fresh look did not impose an unreasonable burden on the carrier.²⁷

Considering Comsat's long-standing monopoly position and the long-term nature of most Comsat contracts, if the Commission permits direct access to INTELSAT, a fresh look policy is warranted to ensure that Comsat's customers are able to enjoy the benefits of direct access.

IV. Relationship To Other Proceedings

By permitting direct access to INTELSAT, PanAmSat has argued that the Commission would, effectively, be authorizing INTELSAT to provide "retail" service in the U.S. but, at the same time, permit it to maintain all the privileges and immunities conferred upon it by treaty that other satellite operators lack.²⁸ Any rules or policies implemented by the Commission with respect to direct access should be harmonized with Congress' deliberations with respect to the privatization of INTELSAT.²⁹ The goal of both endeavors should be to place all satellite operators on a level playing field that provides no special treaty-based advantages in connection with the commercial operation of any particular company.

²⁷ Id. at 5208-5209.

²⁸ Reply Comments of PanAmSat in the Comsat Non-Dominant proceeding at 3.

²⁹ Congress has recently considered the issue of direct access in connection with proposed legislation to deregulate Comsat and privatize INTELSAT. See Report of the Committee on Commerce to Accompany H.R. 1872, "Communications Satellite Competition and Privatization Act of 1998", House of Representatives, 105th Congress, 2nd Sess., Report 105-494 at pp. 58-62 (April 27, 1998). H.R. 1872 would permit Level 3 and Level 4 direct access subject to certain conditions. Similar legislation was introduced but not passed in the Senate (S.1328 and S.2365).

V. Conclusion

For the foregoing reasons, the Commission should permit Level 3 direct access to the INTELSAT system and a fresh look at existing Comsat customer contracts consistent with these comments.

Respectfully submitted,
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